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Supreme Court of the United States

October Term, 1941

No. 831

ERMINIO MORANTE

Petitioner

against

THE PEOPLE OF THE STATE OF NEW YORK

Respondents

RESPONDENTS' BRIEF IN OPPOSITION

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THE PEOPLE OF THE STATE OF NEW YORK,
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RESPONDENTS' BRIEF IN OPPOSITION

The petitioner has applied for review by writ of certiorari of judgment of the County Court of Westchester County, New York, which affirmed a judgment of the Court of Special Sessions of the Village of Mount Kisco, convicting the petitioner of a violation of Section 2147 of the Penal Law of the State of New York.

After a trial before the Court of Special Sessions the petitioner was found guilty and fined the sum of ten dollars, payment of which was suspended (Rec., p. 26). The opinion of the trial court, which is not reported, appears at pages 24-26 of the record. The County Court wrote no opinion, but its order of affirmance will be found at pages 31-32. Thereafter an application for leave to appeal to the Court of Appeals was denied by Chief Judge IRVING LEHMAN, without opinion, by an order dated October 2, 1941 (Rec., pp. 36-37).

The Facts

The petitioner was charged as follows in the information (Rec., p. 1):

> "That one Erminio Morante, on the 14th day of July, 1940, at East Main Street, in the Village of Mount Kisco, County of Westchester, N. Y., at about 11.45 o'clock in the forenoon of said day, did violate subdivision — of section 2147 of the Penal Law of the State of New York, by wrongfully, unlawfully, wilfully and knowingly publicly offered for sale and attempted to sell a pamphlet or circular entitled 'Judge Rutherford Uncovers Fifth Column,' on Sunday in violation of the above section of the Penal Law of The State of New York."

At the trial the petitioner admitted that he was in the village on the date mentioned "for the purpose of going from house to house and distributing Bible literature." From some persons he received contributions and money for the literature. If a person was unable to contribute he left a small book without charge (Rec., p. 2). In response to a question from the court he made the following admission (Rec., p. 2):

> "Defendant admits that he offered the literature for sale, and in one instance one book was sold and in three instances he gave away books."

Apart from these admissions the only proof taken was on the question of whether the petitioner was an ordained minister. He testified that he had been an ordained minister of "Jehovah's Witnesses" for six years, though he had had no college or seminary training prior to being ordained (Rec., p. 3). He offered in evidence a certificate, signed by the "Watch Tower Bible and Tract Society, J. F. Rutherford, President," certifying that the peti-

tioner was "an ordained minister of Jehovah God" and "one of Jehovah's Witnesses" (Deft's Ex. A, pp. 4-5). Fred N. Severud also testified that the petitioner was an ordained minister of Jehovah's Witnesses (Rec., p. 3).

No further proof was offered either by the prosecution or by the petitioner, except that the petitioner introduced in evidence a copy of the booklet which he admitted having offered for sale and sold (Rec., p. 3).

This booklet, marked in evidence as Defendant's Exhibit B, appears at pages 5-24 of the record. It is entitled "Judge Rutherford Uncovers Fifth Column," and purports to consist chiefly of a reprint of an undated letter written by the said Rutherford to a representative of the New York Post. The booklet has for its subject-matter a violently inflammatory attack on the Roman Catholic church, and particularly the clergy of that church, described in the booklet as the "Roman Catholic Hierarchy."

The Roman Catholic clergy are characterized in the booklet as the representatives of the Devil (Rec., p. 14), and his "chief instrument on earth" (Rec., p. 10). They are described as "a political organization, bent on destroying everything that represents the interests of the common people" (Rec., p. 8), and are charged with "attempting to grab control of the nations of the earth" (Rec., p. 7). They are "fifth columnists" (Rec., p. 8), engaged in a secret confederacy with the Nazis, Fascists and Communists (Rec., pp. 10-11), and working in the United States in cooperation with Hitler and Mussolini (Rec., p. 19). They directed the development of Nazism in Germany and are employing the same methods in America (Rec., p. 10). They are engaged in a "fanatical, devilish procedure to destroy democracies, destroy freedom of press and freedom of speech, and destroy all publishers of the truth" (Rec., pp. 12-13). It is said that "their purpose is to seize the government of the United States" (Rec., p. 13). The cellars and crypts of their churches are loaded with guns and ammunition "ready to act

against all opponents in due season" (Rec., p. 17). Stores of rifles have been smuggled into these crypts and cellars in piano boxes (Rec., p. 17). They are seeking to "bring the United States under the control of the Vatican" (Rec., p. 20). Theirs is "a great and hypocritical religious institution that has defamed His (God's) name and devoted its power to unrighteousness" (Rec., p. 18).

In his admissions made at the trial the petitioner characterized this booklet as "Bible literature" (Rec., p. 2). He employs the same descriptive term in his present petition (p. 10). He alleges that he was "doing good unto others in calling upon them at their homes and offering to them helpful Bible explanations in printed form" (Petition, pp. 10-11). Defendant's Exhibit B contains numerous biblical references, but a reading of the exhibit as a whole will show that it consists essentially of a violent attack upon the above-mentioned religious organization. The very title of the booklet discloses its purpose.

The foregoing is a summary of all the evidence in the case. At page 11 of the petition it is alleged that the petitioner testified that he was "commanded by Almighty God to go from house to house and from door to door with this literature, and that he did so from a sense of moral duty or a feeling of kindness for humanity" (Petition, p. 11). The petitioner gave no such testimony. Attention is drawn to the fact that in his affidavit on the application for leave to appeal to the County Court the petitioner gave a wholly inaccurate version of the testimony (Rec., pp. 27-29); so much so, that it was necessary for the Police Justice to protest the contents of the affidavit in his return to the County Court (Rec., p. 4).

The Statute

Section 2147 of the Penal Law reads as follows:

"Public Traffic on Sunday.

"All manner of public selling or offering for sale of any property upon Sunday is prohibited, except as follows:

"1. Articles of food may be sold, served, supplied and delivered at any time before ten o'clock in the morning;

"2. Meals may be sold to be eaten on the premises where sold at any time of the day;

"3. Caterers may serve meals to their patrons at any time of the day;

"4. Prepared tobacco, bread, milk, eggs, ice, soda-water, fruit, flowers, confectionery, souveniers, newspaper, gasoline, oil, tires, drugs, medicines and surgical instruments may be sold in places other than a room where spirituous or malt liquors or wines are kept or offered for sale and may be delivered at any time of the day.

"5. Delicatessen dealers and bakeries may sell, supply, serve and deliver cooked and prepared foods, between the hours of four o'clock in the afternoon and half-past seven o'clock in the evening, in addition to the time provided for in subdivision one hereof.

"The provisions of this section, however, shall not be construed to allow or permit the public sale or exposing for sale or delivery of uncooked flesh foods, or meats, fresh or salt, at any hour or time of the day. Delicatessen dealers shall not be considered as caterers within subdivision three hereof."

ARGUMENT

I

The statute as construed and applied in this case deprives the petitioner of no constitutional right.

Section 2147 of the Penal Law, under which the appellant was convicted, is a part of Article 192, entitled "Sabbath." The purpose of the New York Sabbath laws is stated as follows in section 2140:

> "The Sabbath.
>
> "The first day of the week being by general consent set apart for rest and religious uses, the law prohibits the doing on that day of certain acts hereinafter specified, which are serious interruptions of the repose and religious liberty of the community."

Section 2147 declares that "all manner of public selling or offering for sale of any property upon Sunday is prohibited." When the two sections are read together it will be seen that the Legislature has in effect determined and declared that public selling on the Sabbath is a "serious interruption of the rest and religious liberty of the community." It was competent for the Legislature to make such a determination and to prohibit such activities on Sunday. Statutes of this kind are in general a valid exercise of the police power of the states and within the Constitution.

> *Hennington* v. *Georgia*, 163 U. S. 299;
> *Petit* v. *Minnesota*, 177 U. S. 164.

It is obvious that the activity in which the petitioner was engaged is not included within any of the express exceptions found in the statute. The petitioner contends,

however, that an exception in his favor is to be implied because the statute is directed only against the sale of commercial articles for profit. This contention is unfounded. Section 2140, *supra*, shows that the statute is directed against every activity calculated to interrupt the repose and religious liberty of the community. Evidently the Legislature was of the opinion that all public sales, whether for profit or not, are likely to disturb the peace of the community and should therefore fall within the prohibition.

Furthermore, the state courts have construed the statute as prohibiting the activities of the petitioner in this case. This court will accept the interpretation of the statute by the courts of the state which enacted it, and will only consider the question of whether the statute, as so interpreted, deprives the petitioner of rights guaranteed by the Constitution.

> *Saltonstall* v. *Saltonstall*, 276 U. S. 260;
> *Supreme Lodge, etc.* v. *Meyer*, 265 U. S. 30;
> *Quong Ham Wah Co.* v. *Industrial Acc. Commission*, 255 U. S. 445.

The petitioner claims that the statute, as applied by the state courts, deprives him of his constitutional rights in that: (1) It denies him the right of religious freedom, and (2) it denies the right of freedom of the press. We will discuss each proposition separately.

(a) Religious Freedom

It is at least questionable whether the petitioner was engaged in any religious activity in distributing the pamphlet appearing in the record. In that very pamphlet appears the following assertion (Rec., p. 14):

> "Jehovah's witnesses are not a sect, not a religious organization."

The case therefore presents the situation of an individual, concededly not a member of any religious sect or organization, engaged in the sale of a booklet attacking an established church. It is difficult to see how such a person can claim to be engaged in any religious work.

But assuming the truth of the petitioner's premise, the state may nevertheless properly subject him to the restrictions of its Sabbath laws. Within recent years this court has determined three cases involving the group known as Jehovah's Witnesses, and in all three the opinions contain language appropriate to the present case.

In *Schneider* v. *State,* 308 U. S. 147, an ordinance prohibiting the distribution of circulars by house-to-house canvassing without a license from the police was held invalid. But the court said (p. 165):

> "Nor do we hold that the town may not fix reasonable hours when canvassing may be done by persons having such objects as the petitioner."

In *Cantwell* v. *Connecticut,* 310 U. S. 296, the court held invalid a somewhat similar ordinance, prohibiting the solicitation of funds for a religious cause unless the object was first approved by a local official. But there the court said (p. 305):

> "The general regulation, in the public interest, of solicitation, which does not involve any religious test and does not unreasonably obstruct or delay the collection of funds, is not open to constitutional objection, even though the collection be for a religious purpose."

And the court said further, in the same case (p. 306):

> "The State is likewise free to regulate the time and manner of solicitation generally, in the interest of public safety, peace, comfort or convenience."

These principles support the judgment in the present case. The statute does not unreasonably obstruct or delay the activities of the petitioner or the group to which he belongs. There is no claim, and certainly no evidence, that such activities could not be carried on as effectively on other days of the week. The petitioner is inconvenienced no more than any shopkeeper who is obliged to close his business on Sunday. And it is quite apparent that the prohibition of the sale of such literature as the petitioner had in his possession is conducive to public peace and safety, and therefore within the powers of the State Legislature. It requires no stretch of the imagination to perceive that such reading-matter would be highly offensive to many persons into whose homes these canvassers intrude; and that the public dissemination of pamphlets preaching religious hatred is calculated to foment public disorder. Surely the State must possess the power to protect the community against such provocation on the Sabbath.

The latest of the three cases mentioned above was *Minersville School District* v. *Gobitis*, 310 U. S. 586. There the court upheld a school board regulation requiring public school children to salute the flag. The respondents were members of "Jehovah's Witnesses" and claimed that the salute was contrary to their religious beliefs. The issue of religious freedom, and its relationship to reasonable civil regulation, was therefore directly presented. The court said (p. 594):

> "Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs."

The petitioner cites a recent decision by the Supreme Court of Iowa (*State* v. *Mead*, 300 N. W. 523), reversing

a conviction of other members of the same group for desecrating the Sabbath. There the court held that the defendants were not engaged in selling booklets, and that sales were merely incidental to the main object of preaching the doctrines of their order. Here it is conceded that the petitioner was selling the booklet and it does not appear that he was doing anything else.

(b) Freedom of the Press

It is fundamental that the right of freedom of the press, like the right of free speech, is not absolute. It is subject to reasonable limitation.

Gitlow v. *People*, 268 U. S. 652, 667.

The main purpose of the right of a free press is to prevent restraints upon the publication of the printed matter.

Patterson v. *Colorado*, 205 U. S. 454, 462.

While the free circulation of such material may be essential to the freedom of the press, reasonable regulation of such circulation is not prohibited by the Constitution.

Ex parte Jackson, 96 U. S. 727;
Gitlow v. *Kiely*, 44 Fed. 2d, 227, affd. 49 Fed. 2d, 1077, cert. denied 284 U. S. 648.

Thus the question reduces itself to this: Does the statute, as applied in this case, reasonably serve the purposes for which it was enacted, namely, the protection of the peace and religious liberty of the community? If so, it is a valid exercise of the legislative power. We submit that under the circumstances presented by the present record the statute has been properly and constitutionally applied by the New York courts.

II

The prayer for a writ of certiorari should be denied.

Respectfully submitted,

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